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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY JULIO REBOSSIO,

Defendant and Appellant.

C080279

(Super. Ct. No. 14F05823)

A jury convicted defendant Jimmy Julio Rebossio of lewd and lascivious conduct upon a child under the age of 14 years (count one) and possession of material depicting a person under the age of 18 years engaging in and simulating sexual conduct (count two). The trial court sentenced defendant to six years eight months in prison.

Defendant now contends the trial court erred in consolidating counts one and two, but even if consolidation was proper at the time of the ruling, the resulting unfairness deprived him of due process and a fair trial.

Finding no merit in defendant's arguments, we will affirm the judgment.

BACKGROUND

Elk Grove Police Detective Kevin Papineau received cyber tip information from the National Center for Missing and Exploited Children (NCMEC) that a certain individual in the county had uploaded child pornography to an e-mail account. The e-mail addresses and internet protocol addresses all belonged to defendant.

Detective Papineau and other officers executed a search warrant on defendant, his home and his vehicles. In a home office the detective found a laptop with a browser window open to nine tabs. One browser tab was open to a website with a page entitled, “Cum on Sister’s Sleeping Pussy.” Another tab was open to a website with a category called the “Sleeping, Drunk, Drugged, Passed Out.” Another tab was opened to a picture of a clothed female called “Hana 15 Y.O.” Three tabs were open to “XNXX.com.” Other tabs were open to show Hispanic children. The internet history showed that the user had accessed numerous websites and forums related to sexual conduct with young children. Some of the websites had explicit titles and listed the child’s age. Many of the websites specifically related to sexual conduct with sleeping people.

A forensic analysis of the laptop’s hard drive revealed 310 photographs and 28 videos, all child pornography, with a significant portion focused on children sleeping in various stages of undress. Some photos showed children as young as three-years-old engaging in sexual conduct with adult men or posing in a sexually suggestive manner.

The laptop also contained a video and three photographs of two children sleeping in the same room in defendant’s house. A four-year-old girl, O.T., was on a mattress on the floor and an eight-year-old boy, R.T., was on the top bunk of a bunk bed. They were the children of Victor T. who had resided in defendant’s home. When shown the video and photographs, Victor T. confirmed the children were his and that the location was the bedroom in defendant’s home. One of the photographs showed defendant’s hand “grabbing” a piece of O.T.’s pajamas while she slept.

Officers found an external hard drive in defendant’s nightstand in his bedroom. The hard drive contained an additional 1,187 images of child pornography and included images of naked four-year-old girls in sexually suggestive poses. The laptop hard drive and the external hard drive contained a folder containing a total of 160 images of child pornography marked “Traded,” meaning the files had been shared or traded with others online.

In the nightstand, officers also found 10 compact discs, one of which contained 15 videos and 1,153 images of child pornography. Another disc contained a series of photographs of a sleeping four-or-five-year-old girl with narrative texts between two men, one of whom is behind the camera as the other put his erect penis near her face and ejaculated, leaving fluid on her lips.

Defendant's electronic storage devices also contained a series of pornographic images of a girl when she was between seven and 12 years of age. The girl had been identified as a victim by the NCMEC.

Defendant did not deny possessing child pornography but denied molesting O.T. On the night in question, defendant entered the bedroom where Victor T.'s children were sleeping to check on them. In attempting to use his iPhone's camera flash as a flashlight, he inadvertently activated the phone's camera and took several photos of the children. When shown the photo of him grabbing O.T.'s pajamas, defendant claimed he was making sure O.T.'s nighttime diaper was not saturated. He then repositioned her so she would not roll off the bed. He denied his touching of her involved sexual arousal or gratification.

In rebuttal, the detective noted that the images of O.T. which had been created on October 27, 2013, were last accessed in March and April 2014.

The jury convicted defendant of lewd and lascivious conduct upon a child under the age of 14 years (Pen. Code, § 288, subd. (a) -- count one)¹ and possession of material depicting a person under the age of 18 years engaging in and simulating sexual conduct (§ 311.11, subd. (a) -- count two). The trial court sentenced defendant to state prison for an aggregate term of six years eight months.

¹ Undesignated statutory references are to the Penal Code.

DISCUSSION

Defendant contends the trial court erred in consolidating counts one and two, but even if consolidation was proper at the time of the ruling, the resulting unfairness deprived him of due process and a fair trial.

A

Defendant had moved to sever the two counts, arguing the pornography case would bolster the weaker child molestation case and would unusually inflame the jury. The People opposed the severance motion, arguing the child pornography evidence would be admissible to show defendant's sexual interest in young children, and the evidence of defendant videotaping himself touching O.T. was relevant to establish the identity of the person who downloaded and possessed the large volume of child pornography. The trial court denied the severance motion, finding the two offenses belong to the same class of crimes and the two cases were equally strong. Engaging in an Evidence Code section 352 analysis, the trial court said that while the possession of child pornography evidence was voluminous and graphic, it was not so prejudicial in light of the evidence of lewd conduct, which included a video clip and still photographs. The trial court determined the child pornography evidence involving the sexual touching of sleeping children was cross-admissible to show defendant's intent in touching the victim's buttocks.

At a later hearing on the admission of the child pornography evidence, the trial court said the prosecutor had done an admirable job narrowing the evidence and that the court exercised its discretion under section 352 by excluding duplicative photos.

Defendant now concedes the two offenses are of the same class, but continues to argue the strong child pornography case bolstered the weaker lewd case and the pornographic images and videos were inflammatory. Even if the evidence was admissible, defendant argues it was not necessary to admit the volume of evidence introduced at trial; the prosecutor did not have the right to over-prove his case. He claims

the massive amount of marginally relevant evidence resulted in gross unfairness and a denial of due process.

B

The law favors consolidation to promote efficiency. Consolidation is appropriate when defendant has allegedly committed two or more crimes in the same class, or when the charges are connected in their commission. (§ 954; *People v. Soper* (2009) 45 Cal.4th 759, 771; *People v. Ochoa* (1998) 19 Cal.4th 353, 408-409 (*Ochoa*); *People v. Arias* (1996) 13 Cal.4th 92, 126.) To obtain severance, defendant must demonstrate “ ‘a substantial danger of prejudice requiring that the charges be separately tried.’ ” (*People v. Davis* (1995) 10 Cal.4th 463, 508.) “Because of the factors favoring joinder, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.” (*Arias*, at p. 127.) In determining prejudice, the court considers cross-admissibility and also considers whether certain offenses are more inflammatory or are supported by significantly stronger evidence. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

A trial court’s ruling denying a severance motion is reviewed for abuse of discretion. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.) In reviewing for abuse of discretion, we do not consider the evidence presented at trial but rather the facts presented at the time of the motions for consolidation or severance. (*Ochoa, supra*, 19 Cal.4th at p. 409; *People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1433.) If a trial court’s ruling was proper when made, we will not reverse the judgment unless defendant shows, based on the evidence adduced at trial, that joinder resulted in gross unfairness amounting to a denial of due process. (*Id.* at p. 1434.)

Joinder was proper here. Each offense is considered a “sexual offense.” (See Evid. Code, § 1108, subd. (d)(1)(A).) Moreover, the offenses had common characteristics and were connected in their commission by a common motivation: defendant’s sexual interest in sleeping female children. (*Ochoa, supra*, 19 Cal.4th at

p. 409; *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1112-1113; *People v. Poon* (1981) 125 Cal.App.3d 55, 68-69, overruled on another ground as stated in *People v. Lopez* (1998) 19 Cal.4th 282, 292.)

Evidence supporting each charge was cross-admissible under Evidence Code sections 1101 and 1108. Evidence that defendant engaged in lewd conduct with O.T. would be admissible in a separate trial for possession of child pornography to show propensity and intent to possess. And evidence that defendant possessed child pornography would be admissible in a separate trial for lewd conduct to show propensity to sexually exploit sleeping female children and to show intent. (Evid. Code, §§ 1101, subd. (b), 1108; *People v. Page* (2008) 44 Cal.4th 1, 40.)

Defendant argues the lewd conduct case was weak, but defendant took video and photographs of the children as they slept, including a photo of defendant touching O.T. He claimed the photo of the touching was inadvertent, but he maintained the video and photos and subsequently accessed them.

Defendant cites *People v. Albarran* (2007) 149 Cal.App.4th 214, but that case is distinguishable. The court in *Albarran* held the admission of gang evidence had no connection to the offenses and the inflammatory evidence violated due process. (*Id.* at pp. 217, 223-232.) Here, however, the evidence was relevant and connected to each offense.

In his reply brief, defendant argues this is the kind of case alluded to in *People v. Holford* (2012) 203 Cal.App.4th 155 (*Holford*). In *Holford*, the defendant had been convicted for possession of child pornography and argued on appeal that the trial court abused its discretion in allowing the jury to view an entire 25-minute video file rather than requiring the prosecutor to select a portion of the video to play. (*Id.* at pp. 158-162, 166-167.) The court in *Holford* found no abuse of discretion because the video evidence was the crime (*Id.* at pp. 170-171), but the court noted in a footnote that the case “would present a different balancing analysis had defendant been found in possession of multiple

pieces of child pornography” and stated that the probative value of admitting an entire collection “may not be any higher than admitting only a few pieces unless there are other circumstances.” (*Id.* at p. 171, fn. 7.)

Defendant argues the admission of multiple images of child pornography along with the extensive description by the detective far exceeded the purpose of the evidence and amounted to the admission of defendant’s entire collection of child pornography. But here the record indicates the prosecutor reduced the amount of evidence to be presented, and the trial court exercised its discretion to further limit the evidence. In addition, this case is different from *Holford* because here defendant was also charged with engaging in lewd conduct with a sleeping child.

The trial court did not abuse its discretion in denying defendant’s motion to sever, and defendant has not shown that the joinder resulted in gross unfairness amounting to a denial of due process.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
HOCH, J.